BIOLOGICAL RESOURCES SECTION

FOR THE

KB HOME/ELMWOOD CORRECTIONAL FACILITY PROJECT

SANTA CLARA COUNTY, CALIFORNIA

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September, 2004

F. BIOLOGICAL RESOURCES

1. Introduction

This biological report and habitat characterization is for the 121-acre KB Home/Elmwood Correctional Facility Project (Project) located in the City of Milpitas, Santa Clara County, California. The document is in support of the California Environmental Quality Act (CEQA) review of the proposed residential ands commercial development site by KB Home and commercial development proposed by the County of Santa Clara. The City of Milpitas is the lead CEQA agency. Olberding Environmental, Inc. (Olberding Environmental) prepared this report under contract to David J. Powers and Associates, Inc., who in turn was contracted to the City of Milpitas.

The following discussion is based upon a biological resources analysis conducted by Olberding Environmental. The biological resources analysis included a review of relevant background information, including the California Natural Diversity Data Base (CNDDB) and the California Native Plant Society's (CNPS) Inventory of Rare and Endangered Vascular Plants of California, as well as field investigations performed between July 2003 and January 2004. Supporting documents utilized in the review included a biotic constraints analysis conducted by H. T. Harvey & Associates in July 2002, protocol-level burrowing owl surveys conducted by Olberding Environmental in July 2003, special-status plant surveys performed in August 2004 and a formal U.S. Army Corps of Engineers (Corps) wetland delineation, performed by Olberding Environmental in January 2004 and verified by the Corps in July 2004. Copies of these documents are provided in Appendix A, B, C and D.

2. Location

The KB Home/Elmwood Correctional Facility Project site (development property) is located northeast of the interchange between the 880 Freeway and Great Mall Parkway in southern Milpitas. Two parcels are located to the north and east of the Elmwood Rehabilitation Center. Parcel One is rectangular shaped and spans east to west between the 880 Freeway and Abel Street north of the Elmwood Rehabilitation Center. Parcel Two, also rectangular in shape, is located on the east side of Abel Street and parallels the Elmwood Rehabilitation Center from north to south. Parcel Three is located between the 880 Freeway and the Elmwood Rehabilitation Center northwest of the intersection of the 880 Freeway and Great Mall Parkway. The biological review included the entire 121-acre development property. The development property consists of three separate parcels.

3. Regulatory Context

Biological Resources

The development property is within the general geographical range of several sensitive plant communities and special-status plant and animal species. Biological resources on the development property may fall under agency jurisdictions and regulations described below. For the purposes of this report, the following categories are considered special-status species:

- Federal endangered, threatened, proposed, candidate, and species of concern, as well as species covered by the Bald and Golden Eagle Protection Act.

- California endangered, threatened, rare, proposed, candidate, fully protected and protected, and species of special concern.

- Species on California Native Plant Society lists 1A, 1B, and 2.

- Species listed under local ordinances and "de facto" endangered species under CEQA.

U.S. Fish and Wildlife Service

The U.S. Fish and Wildlife Service (USFWS) has jurisdiction over formally-listed threatened and endangered species under the federal Endangered Species Act. This act protects listed animal species from harm or "take," which is broadly defined as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." An activity can be defined as a "take" even if it is unintentional or accidental. Listed plant species are provided less protection. Plants are legally protected from take under the federal act if on federal land or from federal actions, such as issuing a wetland fill permit. (Nevertheless, listed plants may be protected under CEQA from impacts due to a project.)

An endangered species is one that is considered in danger of becoming extinct throughout all, or a significant portion of its range. A threatened species is one that is likely to become endangered within foreseeable future. The USFWS also maintains a list of species proposed for listing. Proposed species are those species for which a proposed rule to list as endangered or threatened has been published in the *Federal Register*. Proposed species receive only slight protection under Section 7 and no protection under Section 9 of the federal Endangered Species Act (Mueller, 1994).

In addition to endangered, threatened, and proposed species, which are legally protected under the federal Endangered Species Act, the Sacramento Field Office of the USFWS recognizes candidate species and species of concern. Candidate (formerly category 1 candidate) species are those species for which the USFWS has on file sufficient information to support issuance of a proposed listing rule. Species of concern (formerly category 2 candidates) are species for which the USFWS has information indicating that protection under the act may be warranted, but for which they lack sufficient information on status and threats. Candidate species are specifically included on a list published in the *Federal Register*. Federal candidate species and species of concern are not afforded legal protection under the federal Endangered Species Act.

Other Applicable Federal Regulations

Raptors are migratory bird species protected by international treaty under the Migratory Bird Treaty Act (MBTA) of 1918 (16 U.S.C. 703-711). The MBTA makes it unlawful to take, possess, buy, sell, purchase, or barter any migratory bird listed in 50 C.F.R. Part 10, including feathers or other parts, nests, eggs, or products, except as allowed by implementing regulations

(50 C.F.R. 21). Sections 3503, 3503.5, and 3800 of the California Department of Fish and Game Code prohibit the take, possession, or destruction of birds, their nests or eggs. Implementation of the take provisions requires that project-related disturbance at active nesting territories be reduced or eliminated during critical phases of the nesting cycle (March 1 - August 15, annually). Disturbance that causes nest abandonment and/or loss of reproductive effort (e.g., killing or abandonment of eggs or young) or the loss of habitat upon which the birds depend is considered "taking" and is potentially punishable by fines and/or imprisonment. Such taking would also violate federal law protecting migratory birds (e.g., MBTA).

California Department of Fish and Game

The California Department of Fish and Game (CDFG) has jurisdiction over state-listed threatened, rare (plants), and endangered plant and animal species under the California Endangered Species Act. Upon notification of the presence of a state-listed plant on a private owner's property, the private owner must notify the state prior to affecting the plant. (Nevertheless, listed plants may be protected under CEQA from the effects of a project.)

CDFG also maintains a list of species of special concern, defined as species that appear to be vulnerable to extinction because of declining populations, limited ranges, and/or continuing threats. Species of special concern are not afforded legal protection under the California Endangered Species Act.

California fully protected and protected species may not be taken or possessed without a permit from the Fish and Game Commission and/or the CDFG. These take permits do not allow "incidental take" and are more restrictive than the take allowed under Section 2081 for the California Endangered Species Act. Information on fully protected species can be found in the Fish and Game Code (birds at Section 3511, mammals at Section 4700, reptiles and amphibians at Section 5050, and fish at Section 5515). Information on protected (as opposed to fully protected) amphibians can be found in Chapter 5, Section 41; protected (as opposed to fully protected) reptiles at Chapter 5, Section 42.

California Native Plant Society

The California Native Plant Society is a non-governmental conservation organization. CNPS has developed its own lists of special-status plants in California (Skinner and Pavlik 1994). A CNPS List 1A species is considered extinct. A List 1B species is considered rare, threatened, or endangered in California and elsewhere. A List 2 species is considered rare, threatened, or endangered in California but more common elsewhere. A List 3 species is a plant for which CNPS lacks sufficient information to determine if it should be assigned to a list. A List 4 species has a limited distribution in California (a watch list).

Although the CNPS is not a formal regulatory agency, the species on List 1A, List 1B, and List 2 may justify consideration in CEQA documents. CDFG does not consider plants on List 3 and List 4 to be species that require such consideration. Local agencies have the discretion to consider species on all five CNPS lists for treatment under CEQA. For the purposes of this report, we are considering plants on lists 1A, 1B, and 2.

Local Governmental Agencies

The City of Milpitas requires that a permit be obtained prior to removal of any tree as per the *"Tree and Planting Ordinance of the City of Milpitas"* (Ord.201.1[part], 3/1/88). The city defines "ordinance sized" trees as native or non-native tree species that have a circumference of 56 inches or greater (approximately 18 inches in diameter) at 37 inches above natural grade. In addition, "heritage trees," defined as "any tree which because of factors including but not limited to its history, girth, height, species or unique quality has been found by the city council to have a special significance to the community" may be present on the site. The City of Milpitas typically requires that all trees on a given project site be inventoried and categorized according to size, species, and location prior to the issuance of any approval or permit for construction of any improvement.

California Environmental Quality Act

Under Section 15380 of CEQA, a species not included on any formal list "shall nevertheless be considered rare or endangered if the species can be shown to meet the criteria" for listing. With sufficient documentation, a species could be shown to meet the definition of rare or endangered under CEQA and be considered a "de facto" endangered species.

Wetland Resources

U.S. Army Corps of Engineers

The federal government, acting through the Corps and the Environmental Protection Agency (EPA), has jurisdiction over all "waters of the United States" as authorized by §404 of the Clean Water Act (CWA) and §10 of the Rivers and Harbors Act of 1899 (33 CFR Parts 320-330). Projects that cause the discharge of dredged or fill material into waters of the United States require permitting by the Corps. Actions affecting small areas of jurisdictional waters of the United States may qualify for a Nationwide Permit (NWP), provided conditions of the permit are met, such as avoiding impacts to threatened or endangered species or to important cultural sites. Projects that affect larger areas or which do not meet the conditions of an NWP require an Individual Permit. The process for obtaining an Individual Permit requires a detailed alternatives analysis and development of a comprehensive mitigation/monitoring plan.

Waters of the United States are classified as wetlands, navigable waters, or other waters. Wetlands are transitional habitats between upland terrestrial areas and deeper aquatic habitats such as rivers and lakes (Cowardin et al., 1979). Under federal regulation, wetlands are defined as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support and that under normal conditions do support a prevalence of vegetation typically adapted for life in saturated soil conditions" (33 CFR Part 328.3[b]). Swamps, marshes, bogs, fens and estuaries are all defined as wetlands, as are seasonally-saturated or inundated areas such as vernal pools, alkali wetlands, seeps, and springs. In addition, portions of the riparian habitat along a river or stream may be a wetland where the riparian vegetation is at or below the ordinary high water mark and thus also meets the wetland hydrology and hydric soil criteria.

Navigable waters include all waters subject to the ebb and flow of the tides, including the open ocean, tidal bays, and tidal sloughs. Navigable waters also include some large, non-tidal rivers and lakes which are important for transportation in commerce. The jurisdictional limit over navigable waters extends laterally to the entire water surface and bed of the waterbody landward to the limits of the mean high tide line. For non-tidal rivers or lakes which have been designated (by the Corps) to be navigable waters, the limit of jurisdiction along the shoreline is defined by the ordinary high water mark. Other waters refer to waters of the United States other than wetlands or navigable waters. Other waters include streams and ponds, which are generally open water bodies and are not vegetated. Other waters can be perennial or intermittent water bodies and waterways. The Corps regulates other waters to the outward limit of the ordinary high water mark. Streams should exhibit a defined channel, bed and banks to be delineated as other waters.

The Corps does not generally consider "non-tidal drainage and irrigation ditches excavated on dry land" to be jurisdictional waters of the United States (and such ditches would therefore not be regulated by the Corps (33 CFR Parts 320-330, November 13, 1986). Other areas generally not considered jurisdictional waters include: 1) artificially irrigated areas that would revert to upland habitat if the irrigation ceased; 2) artificial lakes and ponds created by excavating and/or diking of dry land to collect and retain water, used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing; 3) waste treatment ponds; 4) ponds formed by construction activities including borrow pits until abandoned; and 5) ponds created for aesthetic reasons such as reflecting or ornamental ponds (33 CFR Part 328.3). However, the preamble also states that "the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories" can be regulated as a jurisdictional water. The EPA also has authority to determine jurisdictional waters of the U.S. on a case-by-case basis. Riparian habitat that is above the ordinary high water mark and does not meet the three-parameter criteria for a wetland, would not be regulated as jurisdictional waters of the United States.

In general, a Corps permit must be obtained before placing fill or grading in wetlands or other waters of the United States. The type of permit depends on the acreage involved and the purpose of the proposed fill.

Regional Water Quality Control Board

The Regional Water Quality Control Board (RWQCB) regulates activities in wetlands and other waters through §401 of the Clean Water Act. Section 401 requires a state water quality certification for projects subject to 404 regulation. Requirements of the certification include mitigation for loss of wetland habitat. In the San Francisco Bay region, the RWQCB may take the lead over the Corps in determining wetland mitigation requirements. Wetland features identified as "isolated waters" are not routinely regulated by the Corps, but continue to fall under the regulatory jurisdiction of the RWQCB.

California Department of Fish and Game

California Fish and Game Code §§1600-1607 require the CDFG be notified of any activity that could affect the bank or bed of any stream that has value to fish and wildlife. Upon notification,

the CDFG has the discretion to execute a Streambed Alteration Agreement. The CDFG defines streams as follows:

> *"... a body of water that flows at least periodically...through a bed or channel having banks and supporting fish and other aquatic life. This includes watercourses having a subsurface flow that supports or has supported riparian vegetation."* (Stream Bed Alteration Program, California Department of Fish and Game).

In practice, CDFG authority is extended to any "blue line" stream shown on a USGS topographic map, as well as unmapped channels with a definable bank and bed. Wetlands, as defined by the Corps, need not be present for CDFG to exert authority.

4. Methods

Pre-field Investigations

Prior to conducting surveys of biological resources on the development property, the most recent version of the CNDDB was consulted to determine historic occurrence of special-status species in proximity to the development property. An additional search was conducted for special status plants using CNPS inventory on line. Special-status species reports were accessed by searching the CNDDB data base by the Milpitas 7.5 minute quadrangle maps representing the development property. The data base report identified special-status species known to occur in the region or have the potential to occur in the vicinity. The CNDDB report was used to focus special-status species analysis of the site prior to the field reconnaissance survey.

Reconnaissance Surveys

Olberding Environmental conducted reconnaissance level surveys of the development project on July 2 and December 15, 2003 and January 7 and August 27, 2004. The surveys consisted of driving and walking throughout the site and evaluating the development property and adjacent lands for potential biological resources. Existing conditions, observed plants and wildlife, adjacent land use, soils and potential biological resource constraints were recorded during the visit.

The objectives of these surveys was to characterize biological resources, determine the presence or absence of special-status species or suitable special-status species habitats listed in the CNDDB data base report and identify any wetland areas that could be potentially regulated by the Corps and/or RWQCB. In addition, Olberding Environmental looked for other potential sensitive species or habitats which may not have been obvious from background data base reports or research. Surveys conducted after the growing season or conducted outside of the specific flowering period for a special-status plant cannot conclusively determine the presence or absence of such plant species; therefore, site conditions and habitat type were used to determine potential for occurrence of several species. When suitable habitat was observed to support a special-status plant or animal species it is noted in the discussion for that particular species. However, the observation of such plants and animals on site is not necessary to make the determination that suitable habitat is present. Regulatory agencies evaluate the possibility of

occurrence based on habitats observed on site and the degree of connectivity with other special-status animal habitats in the vicinity of the development property.

Faunal Surveys

The purposes of the wildlife surveys were to identify special-status wildlife species and/or potential special-status wildlife habitats within the study area. A focused review of literature and data sources was conducted in order to determine which special-status wildlife species had potential to occur in the vicinity of the development property. Current agency status information was obtained from USFWS (2004b, c) for species listed as Threatened or Endangered, as well as Proposed and Candidate species for listing, under the federal ESA; and from CDFG (2004, 2004b) for species listed as Threatened, or Endangered by the state of California under the CESA, or listed as "species of special concern" by CDFG.

Olberding Environmental biologist conducted surveys of the various habitat types within the entire study area, including visible portions of the adjacent properties. The purpose of the habitat survey was to evaluate wildlife habitats and the potential for any protected species to occur on or adjacent to the development property.

Reconnaissance Level Raptor and Burrowing Owl (Athene cunicularia) Survey - Due to the propensity of undeveloped landscapes or abandoned sites to attract various raptor species, a reconnaissance level raptor survey was conducted on the development property on July 2, 2004. Observation points were established on the periphery of the development property such that raptor activity could potentially be viewed. The biologist recorded observations of raptor activity over a fifteen to thirty minute time period. This survey was conducted with the use of binoculars and notes were taken for each species occurrence. Additionally, observation of the utility poles on the site and outside of the development property were conducted. All raptor activity within the body of the development property and adjacent to the site was recorded during the reconnaissance level observation period.

A reconnaissance level burrowing owl (*Athene cunicularia*) survey was also conducted on the development property to identify potential burrow sites or burrowing owl use of on-site habitat. The general presence and density of suitable burrow sites, i.e., rodent burrows, was evaluated for the development property. Rodent burrows encountered during the site visit were investigated for presence of burrowing owl residence. If castings, whitewash, bones, feathers or other signs of burrowing owl habitation was observed, it was recorded. The fence line around the development property and any potential perching sites were investigated for signs of castings at the base of the posts. If signs of burrowing owl were encountered on the development property, it was recorded.

Vegetation Surveys

The purposes of the botanical surveys were (1) To characterize the habitat types (plant communities) of the study area; (2) to determine whether any suitable habitat for any special-status plant species, occurs within the study area; and (3) to determine whether any sensitive habitat types (wetlands) occur within the study area. Site conditions and plant habitat surveys are

important tools in determining the potential occurrence of plants not recorded during surveys (e.g., special-status plants) because presence cannot conclusively be determined if field surveys are conducted after the growing season or conducted outside a specific flowering period.

Botanists from Olberding Environmental conducted focused surveys of literature and special-status species data bases in order to identify special-status plant species and sensitive habitat types with potential to occur in the study area. Sources reviewed include: CNDDB occurrence records for the Milpitas USGS 7.5 quadrangles; CNPS *Inventory* (Skinner and Pavlik 1994) for the Milpitas quadrangles; and standard flora (Hickman 1993). Sources consulted for agency status information include USFWS (2004a, 2004b) for federally listed species and CDFG (2004a) for State of California listed species. Based on information from the above sources, Olberding Environmental developed a target list of special-status plants with potential to occur in the vicinity of the development property.

An Olberding Environmental botanist conducted reconnaissance level surveys to determine habitat types and the potential for special-status plants based on the observed habitat types. Portions of the development property were walked on July 2 and December 15, 2003 and January 7 and August 27, 2004. All vascular plant species that were identifiable at the time the survey was recorded and identified to the species level using keys and descriptions in Hickman (1993).

The habitat types occurring on the development property were characterized according to preestablished categories. In classifying the habitat types on the site, the generalized plant community classification schemes of Baylands Ecosystem Species and Community Profile 2000 (Goals Project (2000)) was consulted. The final classification and characterization of the habitat types of the study area were based on field observations.

Wetland Surveys

On December 15, 2003 and January 7, 2004, field surveys were conducted for the purpose of identifying the extent of Corps jurisdiction within the boundaries of the development property. The lands within the development property were investigated in order to make a technical evaluation as to the extent of Corps jurisdiction based on current and historic land use conditions. Visual observations as to the presence or absence of indicators of wetland soil, vegetation and hydrological conditions were made during the investigation and recorded on topographical maps. The boundary of these jurisdictional areas was further defined in accordance with the Corps regulations and the required methodology described in the 1987 "Corps Wetlands Delineation Manual." The actual determination of jurisdictional waters was made by the Corps, based on a delineation prepared by Olberding Environmental and verified in a letter from the Corps dated July 22, 2004, (Corps file number 28503S).

4. Existing Setting

Biotic Habitats of the Development Property

Olberding Environmental has identified seven different habitats within and directly adjacent to the development property, including non-native herbaceous field, landscaped/ornamental, developed, creek channel, drainage ditch, detention/settling basin, and isolated seasonal wetland.

Non-native Herbaceous Field

This habitat type encompasses much of the former golf course and the adjacent disked fields as well as a sloped embankment leading from the development property down to the shallow drainage ditch located along 880 Freeway. As a result of development and a regular program of disking and mowing, many disturbance-tolerant species such as non-native grasses and invasive forbs are found within these areas of the development property. The dominant forbs include western marsh cudweed (*Gnaphalium palustre*), bristly ox-tongue (*Picris echiodes*), horseweed (*Conyza canadensis*), willow herb (*Epilobium brachycarpum*), and large patches of prickly lettuce (*Lactuca serriola*). The dominant grasses are Italian ryegrass (*Lolium multiflorum*), Mediterranean barley (*Hordeum marinum* var. *gussoneanum*), and rabbit's foot grass (*Polypogon monspeliensis*). Other plant species include high mallow (*Malva sylvestris*), wild radish (*Raphanus sativa*), and peppergrass (*Lepedium pinnatifidum*). The disked areas of the development property have been cultivated for various agricultural uses over the past half century. These areas have been subject to annual and potentially bi-annual disturbance for many years. Currently, the plant species found in the disked fields consist of rip-gut brome (*Bromus diandrus*), wild oat (*Avena fatua*), soft chess (*Bromus hordeaceous*), Italian rye, field mustard (*Brassica rapa*), wild radish, spikeweed (*Hemizonia pungens*), shining peppergrass (*L. latifolium*), Alkali mallow (*Malvella leprosa*) and field bind weed (*Convolvulus arvensis*).

Landscaped/Ornamental

Landscaped areas are characterized by ornamental trees with a grassy understory where disking or mowing has not been conducted. The eastern portion of the development property is bisected by a line of tall (approximately 60 ft.) elm trees (*Ulmus* sp.), that likely function as a historic wind break and estate entry road. A mixed stand of redwood (*Sequoia sempervirens*) and oleanander (*Nerium oleander*) form a border with the 880 Freeway. Pine (*Pinus* sp.), elm, blue gum (*Eucalyptus globulus*) and cypress (*Cupresses* sp.) are planted along the northern development property boundary.

Developed

Areas described as developed include buildings associated with the former golf course, and a portion of the development property east of Abel Street, which was at one time paved and served as a parking lot. Within the former golf course, ornamental species include iris (*Iris* sp.), pennisetum (*Pennisetum* sp.), lantana (*Lantana* sp.) date palm (*Phoenix* sp.), and pampas grass (*Cortaderia jubata*). In the absence of regular landscape maintenance, rattail fescue (*Vulpia myuros*) and coyote brush have become established as well. The former parking lot has areas

covered with various dumped materials including wood chips, fill dirt, and gravel. Vegetation consists of Italian thistle (*Carduus pycnocephalus*), prickly lettuce and black mustard (*Brassica nigra*) found mainly along the perimeter of the site.

Creek Channel

Penitencia Creek is defined by engineered slopes and a flat linear channel. It is tributary to Coyote Creek approximately two miles downstream. Vegetation on the slopes of the creek consist of non-native herbaceous forbs and annuals grasses. Vegetation on the slopes of the channel is mowed annually. Within the channel the vegetation is composed of perennial herbaceous species such as umbrella sedge (*Cyperus eragrostis*), Dallis grass (*Paspalum dilatatum*), and a few cattail (*Typha latifolia*) patches. This vegetation is found along the edge of the channel at the low flow line. Nuisance water moves from stormdrains into the Penitencia Creek channel providing almost year round water flows. The section of Penitencia Creek within the development property boundary amount to 0.40 acres as verified by the Corps on July 22, 2004.

Drainage Ditch

The drainage ditch located outside but directly adjacent to the western boundary, follows the 880 Freeway for the entire length of the development property. This ditch is approximately three feet wide and incised with a drop of up to three feet from the freeway edge. This ditch runs the length of the development property for a total of approximately 1,884 linear feet. The surface area amounts to 0.13 acres. Freeway runoff water that enters this ditch flows south toward Great Mall Parkway and the large detention/settling basin. No water was encountered in the entire length of the ditch during December 2003 and January 2004 surveys that were conducted shortly after rainfall events, nor were signs of scour or water flows evident. Garbage, paper and other debris were located within the channel and were undisturbed due to the lack of water movement in the constructed ditch. This drainage ditch was characterized by annual grassland vegetation. The species that were found on the slopes consisted of wild oat, rip gut brome, and soft chess. The bottom of the v-ditch was vegetated with upland grasses including the aforementioned species, and other plants such as Italian rye grass, saltgrass (*Distichlis spicata*), and goosefoot (*Chenopodium album*). This feature is not regulated by the Corps as it is a constructed drainage facility.

Detention/Settling Basin

The constructed detention/settling basin located at the southern portion of the development property consist of a large shallow area that holds surface run-off. The feature is approximately 80 x 410 feet for a total of 32,800 square feet or 0.75 acres. The basin is connected to several large drainage inlet culverts located beneath the Elmwood Correctional Facility Roadway. These culverts are connected to a similar detention/settling basin area on the east side of the road. The basin was inundated and saturated shortly after December 2003 and January 2004 rainfall events. The detention/settling basin supports seasonal and perennial wetland vegetation composed of rabbit's foot grass, Italian rye grass, alkali bulrush (*Scirpus robustus*), umbrella sedge (*Cyperus eragrostis*), and cattails. The majority of vegetation was found on the periphery of the basin in

the more shallowly inundated regions. This feature is not regulated by the Corps as it qualifies for a discretionary exemption under Section 404 regulations. The RWQCB would have regulatory jurisdiction over this feature as a "water of the State".

Isolated Wetland

An isolated seasonal wetland feature is positioned in a topographical depression between the berm surrounding the detention/settling basin and the temporary stock pile (removed material from the basin). It appears that the temporary stockpile is blocking the normal direction of surface flow causing stormwater to pond behind the stockpile. This feature is approximately 60 x 260 feet for a total of 15,600 square feet or 0.358 acres. This area was inundated and saturated at the time of the December 2003 survey. The isolated seasonal wetland support vegetation primarily composed of weedy wetland species. Plants such as alkali mallow, Mediterranean barley, horseweed, willow herb and other annual grasses and forbs were observed. This feature is not regulated by the Corps as it qualifies for a discretionary exemption under Section 404 regulations. The RWQCB would have regulatory jurisdiction over this feature as a "water of the State".

Animal Species of the Development Property

Several different animal species occur on the development property. The habitats found on the site are all human influenced, however, many urban adapted species can still occur and thrive in these habitats. Animal species were either directly observed, evidence of their presence such as droppings, feathers, or nest material was noted, or they were assumed present based on their known occurrence in the vicinity and the suitability of the habitat.

Non-native Herbaceous Field

The former golf course portion of the development property offers suitable habitat for several wildlife species in the form of cover, foraging and breeding habitat. American (*Caruelis tristis*) and lesser goldfinch (*C. psaltria*) likely forage for seeds and northern mockingbird (*Mimus polyglottos*), western scrub jay (*Aphelocoma californica*), and American robin (*Turdus migratorius*) will obtain insects associated with the grassland and herbaceous habitats of this area. Killdeer (*Charadrius vociferus*) were present on the site and likely use the sand traps as breeding habitat. Mourning dove may also nest on the ground as grasses become taller and offer more protection. Black-tailed hare (*Lepus californicus*), California ground squirrel (*Spermophilus beecheyi*) and Botta's pocket gopher (*Thomomys bottae*) were observed on the former golf course portion of the development property. The disked fields, while offering much less cover for wildlife, provide important foraging habitat for a variety of species. Cliff swallows were observed nesting under the entryway bridge to the Elmwood Correctional Facility from Abel Street. These birds were observed foraging over the disked fields that likely serve as foraging habitat for other aerial insectivores such as barn swallow (*Hirundo rustica*), and white-throated swift. Black phoebe (*Sayornis nigracans*) was also noted foraging for insects in the disked field and may nest under the entryway bridge. Raptor species are also likely to use the disked fields as foraging habitat where they will likely encounter many small rodents. Turkey vultures (*Cathartes aura*) were observed foraging aerially during surveys of the site. Other

raptor species that are likely to occur on the development property include white-tailed Kite (*Elanus leucurus*), red-tailed hawk (*Buteo jamaicensis*), American kestrel (*Falco sparverius*) and northern harrier (*Circus cyaneus*). Ground squirrel burrows are present in several areas of the disked fields, however, their numbers, and those of other fossorial (burrowing) mammals, are probably limited by annual disking activity. Other mammals that are likely to be found here include black-tailed hare, deer mouse (*Peromyscus maniculatus*), house mouse (*Mus musculus*) and roof rat (*Rattus rattus*). Gopher snake (*Pituophis melanoleucus*) and western fence lizard (*Sceloporus occidentalis*) were present in this area as well.

Landscaped/Ornamental

Eucalyptus and elm trees provide important roost sites, perches and nest sites for a number of bird species, especially raptors. Smaller bird species are known to use the trees as well due to the proliferation of flowers produced in the winter. Eucalyptus trees provide foraging habitat in winter for yellow-rumped warbler (*Dendroica coronata*) as lerps (*Spondyliaspis* sp.) (scale-like arthropods) begin to aggregate on the flowers. Also, Anna's hummingbird (*Calypte anna*) forages on the flower nectarines of the eucalyptus trees. The American crow (*Corvus brachyrhynchos*), barn owl (*Tyto alba*), and great horned owl (*Bubo virginianus*) could roost in the upper limbs of the eucalyptus and elm trees. Tree-nesting raptors such as white-tailed kite, red-tailed hawk, red-shouldered hawk (*Buteo lineatus*) American kestrel and turkey vulture may use these and other tall trees for breeding habitat though evidence of nesting by these species was not noted during field surveys of the development property. Smaller trees and shrubs may be used as nesting and foraging habitat by such species as northern mockingbird, western scrub jay and American robin.

Developed

Ornamental plantings in the area of the former golf course facilities do provide cover and breeding habitat for a variety of urban adapted wildlife species. Lesser goldfinch, northern mockingbird, bushtit and California towhee (*Pipilo crissalis*), in particular, are well adapted to nesting in shrubs and small ornamental trees. Mammal species that may use the former parking lot and golf course include California ground squirrel, Botta's pocket gopher, house mouse and roof rat. Emergent vegetation found in the artificial concrete lined pools of the golf course may provide foraging and breeding habitat for Pacific tree frog, while surrounding dense ornamental vegetation likely provides cover and foraging habitat for western fence lizard.

Penitencia Creek

Penitencia Creek was used by an immature green heron (*Butorides virescens*) during one of the suveys. Green herons and other wading bird species such as great egret (*Ardea alba*), great blue heron (*A. herodias*), and snowy egret are likely to use the creek as foraging habitat in the late winter to early spring months when water levels are higher. Waterfowl such as mallard and American coot may also forage in this area.

Drainage Ditch

The drainage ditch adjacent to the 880 Freeway does not offer much in the way of cover for wildlife. When inundated, it may provide suitable habitat for Pacific tree frogs (*Hyla regilla*) and aquatic invertebrates. Waterfowl such as American coot (*Fulica americana*) and mallard (*Anas platyrhynchos*) and wading species such as great egret (*Casmerodius albus*) and snowy egret (*Egretta thula*) may forage in these habitats as well. Location of this feature to the freeway may deter many species from using the resources provided.

Detention/Settling Basin

The detention basin lacks dense vegetative cover for wildlife species. However, the open water habitat provided within the detention/settling basin is highly suitable habitat for ducks and wading bird species. Mallard, northern pintail (*Anas acuta*), northern shoveler (*Anas cypeata*) and other such dabblers find the area appropriate for over wintering. Wading birds such as green herons, great egret, snowy egret, great blue heron, black-neck stilt (*Himantopus mexicanus*), greater-yellow legs (*Tringa melanoleuca*), and killdeer would also find the winter conditions excellent for foraging. The basin may occasionally attract shorebird species such as western (*Calidris mauri*) and least (*C. minutilla*) sandpipers. It may also provide additional foraging habitat for nearby cliff swallow (*Hirundo pyrrhonota*) and white-throated swift (*Aeronautes saxatalis*) colonies.

Isolated Wetland

This feature is regularly disked, which greatly decreases its value to wildlife as wetland vegetation can not become established to provide food and cover. During winter inundation the same species found within the settling basin will likely use the wetland for foraging. Birds likely move between the two features as insects become available in respective wetland areas.

5. Special-Status Plant and Wildlife Species

Special-Status Species Regulations

Several plant and animal species known to occur in the vicinity of the development property have been given special status under federal or state endangered species legislation or otherwise have been designated as sensitive by state resource agencies or professional organizations whose lists are recognized by responding agencies when reviewing environmental documents. Such species are referred to collectively as "species of special-status".

The federal Endangered Species Act (ESA) of 1973 (16 USC 1531 et seq., as amended) prohibits federal agencies from authorizing, permitting, or funding any action that would result in biological jeopardy to a plant or animal species listed as "threatened" or "endangered" under the Act. If a proposed project may jeopardize any listed species, Section 7 of the ESA requires consideration of those species through formal consultations with the USFWS. If a proposed project may jeopardize any species proposed for listing, Section 7 of the ESA affords consideration of those species through informal conferences with USFWS. The USFWS defines

"candidate" species as "those taxa for which sufficient information is on file regarding biological vulnerability and threats to support listing actions." Federal candidate species are not afforded formal protection, although USFWS encourages other federal agencies to give consideration to Candidate species in environmental planning.

In addition to compliance with CEQA, project permitting and approval requires compliance with the 1984 California Endangered Species Act (CESA), and the 1977 Native Plant Protection Act (NPPA). The CESA and NPPA authorize the California Fish and Game Commission to designate endangered, threatened and rare species and to regulate the taking of these species (Sections 2050-2098 of the Fish & Game Code). The California Code of Regulations (Title 14, Section 670.5) lists animal species that are considered endangered or threatened by the State.

The Natural Heritage Division of the CDFG administers the State's rare species program. The CDFG maintains lists of designated endangered, threatened, and rare plant and animal species. Listed species either were designated under the NPPA or designated by the Fish and Game Commission. In addition to recognizing three levels of endangerment, the CDFG can afford interim protection to candidate species while they are being reviewed by the Fish and Game Commission.

The CDFG also maintains a list of animal species of special concern (SCS), most of which are species whose breeding populations in California may face extirpation. Although these species have no legal status, the CDFG recommends considering them during analysis of proposed project impacts to protect declining populations and avoid the need to list them as endangered in the future.

Under provisions of Section 15380(d) of the CEQA Guidelines, the project lead agency and CDFG, in making a determination of significance, must treat non-listed plant and animal species as equivalent to listed species if such species satisfy the minimum biological criteria for listing. In general, the CDFG considers plant species on List 1A (Plants Presumed Extinct in California), List 1B (Plants Rate, Threatened, or Endangered in California and Elsewhere), or List 2 (Plants Rare, Threatened, or Endangered in California, But More Common Elsewhere) of the California Native Plant Society's (CNPS) Inventory of Rare and Endangered Vascular Plants of California as qualifying for legal protection under Section 15380(d). Species on CNPS List 3 or 4 may, but generally do not, qualify for protection under this provision.

Sensitive habitats include riparian corridors, wetlands, habitats for legally protected species and CDFG Species of Special Concern, areas of high biological diversity, areas providing important wildlife habitat, and unusual or regionally restricted habitat types. Habitat types considered sensitive include those listed on the CNDDB working list of "high priority" habitats (i.e., those habitats that are rare or endangered within the borders of California).

While the legal protections for these species varies, CEQA Guidelines Section 15380 states that species not included in any listing identified shall nevertheless be considered to be "endangered", "rare" or "threatened", if the species can be shown to meet the criteria of these classifications.

A search of published accounts on the location of these species was conducted using CNDDB Rarefind reports (2001), California Wildlife Habitat Relationships species notes (CDFG 1988, 1990a, 1990b) the CNPS Inventory of Rare and Endangered Vascular Plants of California (CNPS 2001), The Jepson Manual (Hickman 1993), and Manual of the Grasses of the United States (Hitchcock 1971) as well as prior environmental documents and internal documents. In addition, H. T. Harvey & Associates and Olberding Environmental conducted surveys for special-status plant and animal species' habitats within the development property.

The special-status species identified as having the potential to occur in the vicinity of the development property are listed in Tables 1 and 2.

Special-Status Plant Species

Alkali milk-vetch

Alkali milk-vetch is on CNPS List B. It has no federal or state listing status. Historically, this plant occurred throughout the west-central portion of California. The most recent occurrence within the vicinity of the development property was in Fremont in 2001. However, the last Bay Area collection prior to the 2001 occurrence was made in 1959 and the species may be extirpated from much of its former range.

Alkali milkvetch is an herbaceous annual that is a member of the pea family (*Fabaceae*). Small red to purple flowers bloom between April and June on a thin, twining stem. Generally, this plant is low growing and occurs within seasonal wetland, alkali sink, and salt marsh habitats. Alkali milkvetch is known to grow specifically within annual grassland components of the upper zones of saline soils that are intermittently flooded. In addition, alkali milk vetch may be observed in the upper zones of vernal pools and swales with alkaline soil conditions. The detention/settling basin and isolated seasonal wetland are within the known range for this species, and while artificial in origin, could be potentially suitable for the occurrence of this species. This species was not observed during surveys performed July 2003 through August 2004.

San Joaquin Spearscale

San Joaquin spearscale is a CNPS List 1B species with no state or federal listing status. This species was once found as far north as Glenn County and as far south as Tulare County. It was distributed from west to east from Monterey County to Tulare County. It is presumed extirpated from Santa Clara County. A search of CNDDB shows that the most recent occurrence of this species was in 2001 at Pacific Commons Preserve in Fremont within Alameda County, approximately 6 miles northwest of the development property.

San Joaquin spearscale is in the Goosefoot family (*Chenopodiaceae*). It grows in alkali wetlands and sinks, chenopod scrub, meadows, playas, and in valley and foothill grasslands. The blooming period for this species is April through October. Alkaline soils exist on the development property in absence of discing. It is possible that this species could be found on the periphery of the detention/settling basin. This species was not observed during surveys

performed July 2003 through August 2004. Surveys were performed during the appropriate blooming period for this species. Therefore, San Joaquin spearscale is assumed to be absent from the Property.

Congdon's Tarplant

Congdon's tarplant is on CNPS List 1B indicating that it is rare, threatened, or endangered in California and elsewhere. It has no federal or state listing status, but is a federal species of concern. Historically it was distributed from Solano County south to San Luis Obispo County. There are multiple occurrences of this species within the Milpitas quadrangle. Many historical and current reports of this species in the South Bay area include occurrences in Fremont, Milpitas, Sunnyvale, Alviso, Mountain View, and Menlo Park (CNDDB 2003). It has been reported as recently as 2002 in Sunnyvale Baylands in Sunnyvale, approximately 5 miles west of the development property. It was reported near the north city limits of Milpitas approximately 1.5 miles northeast of the development property in 1998. The largest nearby population of this species is in the grasslands between Nortech Parkway and Grand Boulevard in Alviso.

Congdon's tarplant is a member of the genus Hemizonia in the sunflower family (*Asteraceae*). It is one of four subspecies of Parry's tarplant (*Hemizonia parryi*). Congdon's tarplant (*H. p.* ssp. *congdonii*) is a prostrate to erect, annual herb with rigidly spine-tipped leaves and yellow ray- and disk-flowers (head). Congdon's tarplant occurs in valley and foothill grasslands in moist alkaline soils and blooms between June and November. The ruderal grassland and herbaceous annual habitat provides marginally suitable conditions to support this plant. In absence of disking it is possible this species could potentially be found on the development property; however, when disking occurs it is unlikely to be found. The habitat within the detention/settling basin may be potentially suitable for the occurrence of this plant species. This species was not observed during surveys performed July 2003 through August 2004. Surveys were performed during the appropriate blooming period for this species. Therefore, Congdon's tarplant is assumed to be absent from the Property.

Robust Spineflower

Robust spineflower is a CNPS List 1B species from the Buckwheat family (*Polygonaceae*). It is listed as an endangered species by USFWS but has no special-status in California. It is considered extirpated from much of its former range, which included Alameda, Monterey, Santa Clara, Sacramento and San Mateo counties although populations do exist in Santa Cruz and Monterey counties. The most recent occurrence of this species was in 1882 in east San Jose approximately 6 miles south of the development property.

Robust spineflower is an annual herb that exhibits grayish, soft, and hairy stems with very small white to rose colored flowers. This species occurs in cismontane woodland, coastal dunes, and coastal scrub in sandy or gravelly soil. It is presumed absent from the site due to a lack of suitable soils and a lack of recent occurrences of this species within the development property vicinity. This species was not observed during surveys performed July 2003 through August 2004. Surveys were performed during the appropriate blooming period for this species. Therefore, robust spineflower is assumed to be absent from the Property.

Point Reyes Bird's-beak

Point Reyes bird's-beak is on CNPS List 1A and has no state of federal listing status. Its historical distribution includes Alameda, Humboldt, Marin, Santa Clara, San Mateo, and Sonoma counties. It is considered extirpated from Alameda, San Mateo and Santa Clara counties. It was last observed in 1905 in the town of Alviso, approximately 3 miles west of the site.

Point Reyes bird's beak occurs in salt marshes and swamps and blooms from June to October. Whitish, bilateral flowers may be observed on flowering stalks between three to twelve inches in height. Point Reyes bird's-beak can be found in diked salt marsh habitat as well as the upper edges of coast salt marsh. This plant unusually is found where the high to highest flood water occurs. As water levels rise the seeds from this plant are transported to the drift line areas where they germinate while floating then settle to grow as the water recedes. It is presumed absent from the site due to a lack of suitable habitat and because of a lack of recent occurrences in the vicinity of the development property. This species was not observed during surveys performed July 2003 through August 2004. Surveys were performed during the appropriate blooming period for this species. Therefore, Point Reyes bird's beak is assumed to be absent from the Property.

Contra Costa Goldfields

Contra Costa goldfields are considered a CNPS List 1B species. They are listed as endangered by the USFWS but have no special-status in California. Historically, this species was distributed throughout Alameda, Contra Costa, Mendocino, Monterey, Napa, Santa Barbara, Santa Clara, and Solano counties. It is considered extirpated in Mendocino, Santa Barbara and Santa Clara counties, however there is a report of an occurrence of this species in 2001 in Fremont, Alameda County, California, approximately 6 miles northwest of the development property.

Contra Costa goldfields is a member of the sunflower (*Asteraceae*) family and exhibits small yellow flowers in the early to mid-spring. This goldfield is distinguished from other species in the genera due to the fusion of the phillaries. The plant is only known from Contra Costa and Alameda Counties and is found in vernal pools, depressions or seasonal wetland areas. More general habitats that they are known to occur in consist of cismontane woodlands, playas, valley and foothill grassland, and mesic vernal pools in alkaline soils. Although artificially constructed, the seasonal wetland habitat present in the detention/settling basin and isolated wetland could potentially be suitable for this plant species. This species was not observed during surveys performed July 2003 through August 2004.

Prostrate Navarretia

Prostrate navarretia is on CNPS List 1B and has no federal or state-special status listing. The historical distribution for prostrate navarretia includes Alameda, Los Angeles, Merced, Monterey, Orange, Riverside, San Bernardino, and San Diego counties. It is thought to be extirpated in San Bernardino County. In 2001 there were two reported occurrences of prostrate navarretia at Pacific Commons Preserve in Fremont, approximately 6 miles northwest of the development property.

Prostrate navarretia is known to occur in coastal scrub, valley and foothill grasslands, and mesic vernal pools in alkaline soils and blooms between April and July. Moderately suitable conditions exist for this species within the development property; however, it is unlikely to occur due to a regular program of disking. This species was not observed during surveys performed July 2003 through August 2004. Surveys were performed during the appropriate blooming period for this species. Therefore, prostrate navarretia is assumed to be absent from the Property.

California Seablite

California seablite is a CNPS List 1B species. It is listed as endangered by the USFWS but has no special status listing in California. Historically, this species was distributed in Alameda, Santa Clara and San Luis Obispo Counties, however it is now considered extirpated in all counties but San Luis Obispo. The most recent recorded occurrence of this species was in 1986, north of Mud Slough in Fremont, approximately 4.5 miles northwest of the development property.

California seablite is a member of the Goosefoot family (*Chenopodiaceae*). It occurs in coastal marshes and swamps and its blooming period is from July through October. It is presumed absent from the site due to a lack of suitable habitat to sustain the species. This species was not observed during surveys performed July 2003 through August 2004. Surveys were performed during the appropriate blooming period for this species. Therefore, California seablite is assumed to be absent from the Property.

Fragrant Fritillary

Fragrant fritillary is on CNPS List 1B. It has no state listing-status but is a federal species of concern. This species is known from the majority of the Bay Area counties, but is severely threatened by grazing and the loss of habitat to agriculture and urban development. The closest known population to the development property was recorded in the early 1990's from the vicinity of San Jose (near the community of Evergreen), a few miles south of the development property.

Fragrant fritillary, a member of the lily family (*Liliaceae*), occurs in grassy, often disturbed areas both inland and in coastal areas on serpentine and non-serpentine soils. It blooms in the early spring (February-April). Potentially suitable habitat for fragrant fritillary is available in the grassland habitat covering the site. This species was not observed during surveys performed July 2003 through August 2004.

Hairless Popcorn-flower

Hairless popcorn-flower is on CNPS List 1A (considered extinct), but it is considered extant (not extinct) by CDFG. It has no state or federal listing-status. Historically, it occurred in Alameda, Merced, Marin, San Benito, and Santa Clara counties, but since 1930 all collection sites have been located in the Hollister area (San Benito County). Occurrences near the development property in Santa Clara and Alameda counties are recorded from the 1890's, except one from 1955.

Hairless popcorn-flower, a member of the borage family (Boraginaceae), occurs in wet, alkaline soils in meadows and valleys. Potentially suitable habitat is present on the site in the wetland areas to the south. Hairless popcorn-flower is an annual species that blooms in April and. It is highly unlikely that this popcorn-flower is present on the site because it has not been recently observed and is considered extinct by some botanists. Therefore, this species is presumed absent from the site. This species was not observed during surveys performed July 2003 through August 2004.

Table 1
Special Status Plant Species with Potential to Occur in the Vicinity

Scientific Name Common Name[1]	USFWS Listing[2]	State Status[3]	CNPS Status[4]	Habitat[5]	Distribution by County[6]	Period Identifiabl
Astragalus tener var. *tener* Alkali milk-vetch	None	None	3-2-3 List 1B	Alkaline or adobe clay soil, playas, valley and footlhill grassland, vernal pools	ALA*, CCA*, MER, MNT*, NAP, SBT*, SCL*, SFO*,STQ*, SOL, SON*, STA*, YOL	March - Ju
Atriplex joaquiniana San Joaquin spearscale	None	None	2-2-3 List 1B	Alkaline soil, chenopod scrub, meadows, playas, valley and foothill grassland	ALA, CCA, COL, GLE, MER, MNT, NAP, SAC, SBT, SCL*, SJQ*, SOL, TUL, YOL	April - Octo
Centromadia parryi ssp. congdonii Congdon's tarplant	None	None	3-3-3 List 1B	Valley and foothill grassland; in moist alkaline soils	ALA, CCA, MNT, SCL, SCR*, SLO, SMT, SOL*	June - Nover
Chorizanthe robusta var. robusta Robust spineflower	Endangered	None	3-3-3 List 1b	Cismontane woodland, coastal dunes, coastal scrub in sandy or gravelly soil	ALA*, MNT, SCL*, SCR, SMT*	April - Septe
Cordylanthus maritimus ssp. Palustris Point. Reyes bird's-beak	None	None	2-2-2 List 1B	Coastal salt marshes and swamps	ALA*, HUM, MRN, SCL*, SMT*, SON	June -Octo
Lasthenia conjugens Contra Costa goldfields	Endangered	None	3-3-3 List 1B	Cismontane woodland, playas, valley and foothill grassland, mesic vernal pools in alkaline soils.	ALA, CCA, MEN*, MNT, NAP, SBA*, SCL* SOL	March - Ju
Navarretia prostrata Prostrate navarretia	None	None	2-3-3 List 1B	Coastal scrub, valley and foothill grassland, mesic vernal pools in alkaline soils	ALA, LAX, MER, MNET, ORA, RIVE, SBD*, SDG	April - Ju
Suaeda californica California seablite	Endangered	None	3-3-3 List 1B	Marshes and swamps	ALA*, SCL*, SLO	July – Octo
Fragrant Fritillary	None	None	2-3-3 List 1B	Valley and foothill grassland	ALA, CCA, MEN*, SBA*, SCL*	February - A
Hairless Popcorn-flower	None	None	3-3-3 List 1B	Alkaline soil, meadows, valley and foothill grassland	ALA, CCA, MER*, MRN, SBT*, SCL	April - M

[1]Nomenclature follows Hickman (1993) and Skinner and Pavlik (1994).
[2]U.S. Fish and Wildlife Service (1999a,b).
[3]Section 1904, California Fish and Game Code (California Department of Fish and Game 2000a)
[4]Skinner and Pavlik (1994)
Top line: CNPS R-E-D (Rarity-Endangerment-Distribution) code. Rarity: 1=Rare, but found in sufficient numbers and distributed widely enough that the potential for extinction is low at this time; 2=Occurrence confined to several populations or to one extended population; 3=Occurrence limited to one or a few highly restricted populations, or present in such small numbers that it is seldom reported. Endangerment: 1=Not endangered; 2=Endangered in a portion of its range; 3=Endangered throughout its range. Distribution: 1=More or less widespread outside California; 2=Rare outside California; 3=Endemic to California.
Bottom Line: CNPS List. List 1B: Rare, Threatened or Endangered in California and elsewhere. List 4: Plants of limited distribution: a watch list.
[5]Munz and Keck (1973); Hickman (1993); Skinner and Pavlik (1994); and unpublished information.
[6]Skinner and Pavlik (1994) and unpublished information; counties abbreviated by a three-letter code (below); (*) indicates extirpation; occurrence in other areas as indicated.

ALA: Alameda
AMA: Amador
BUT: Butte
CCA: Conta Costa
COL: Colusa
DNT: Del Norte
FRE: Fresno
GLE: Glenn
HUM: Humboldt
KRN: Kern
LAK: Lake
LAX: Los Angeles
MAD: Madera
MEN: Mendocino
MER: Merced
MNT: Monterey
MOD: Modoc
MPA: Mariposa
MRN: Marin
NAP: Napa
NEV: Nevada
ORA: Orange
PLU: Plumas
RIV: Riverside
SAC: Sacramento
SBA: Santa Barbara
SBD: San Bernardino
SBT: San Benito
SCL: Santa Clara
SCR: Santa Cruz
SCT: Santa Catalina Island (LAX Co.)
SCZ: Santa Cruz Island (SBA Co.)
SDG: San Diego
SFO: San Francisco
SIS: Siskiyou
SJQ: San Joaquin
SLO: San Luis Obispo
SMT: San Mateo
SOL: Solano
SON: Sonoma
SRO: Santa Rosa Island (SBA Co.)
STA: Stanislaus
THE: Tehama
TUL: Tulare
VEN: Tuolumne
YOL: Yolo
YUB: Yuba

Special-Status Animal Species and Their Habitats

The special-status wildlife species presented in Table 2 are the endangered, threatened and sensitive wildlife species with the potential to occur in the development property based on available habitat. According to Section 15380 of the CEQA Guidelines, a species not listed by the State of California "shall nevertheless be considered rare or endangered if the species can be shown to meet the criteria" for listing. The USFWS encourages the consideration of proposed and candidate species in environmental planning, such as environmental impact analysis, under the National Environmental Policy Act of 1969.

Species that are listed in Table 2, but that have no potential to occur on the development property based on the lack of suitable habitat, will not be discussed further. The following section contains a summary and discussion of the special-status wildlife species listed in Table 2, which are either known to occur or have potential to occur at the development site based on our habitat evaluation and the focused species survey results.

Chinook Salmon

The Central Valley spring-run Chinook salmon (*Oncorhynchus tshawytscha*) is listed as threatened in the State of California and under the Endangered Species Act (ESA). The Sacramento River winter-run Chinook salmon is listed as endangered in the State of California and under the ESA. The Central Valley Evolutionarily Significant Unit (ESU) includes populations in the Sacramento River Basin. Critical habitat includes all rivers accessible to Chinook salmon in the Sacramento River and its tributaries and rivers and estuarine areas of the Sacramento and San Joaquin Delta in the state of California. All waters from Chipps Island to Carquinez Bridge, and all waters of San Pablo Bay west of the Carquinez Bridge and all waters of San Francisco Bay, north of the San Francisco/Oakland Bay Bridge are also included. The Sacramento River ESU includes the Sacramento River population in California's Central Valley. Critical habitat includes the Sacramento River between Kiswick Dam to Chipps Island, all waters from Chipps Island to the Carquinez Bridge, and all waters of San Pablo Bay west of the Carquinez Bridge, and wall waters of San Francisco Bay north of the San Francisco/Oakland Bay Bridge.

Historically Chinook salmon were found from Point Hope, Alaska to the Ventura River in southern California. The Central Valley spring-run and Sacramento River winter-run ESUs are two of 17 ESUs identified by National Marine Fisheries Service (NMFS) for the west coast. These fish spend part of their life cycle in freshwater, and part in ocean water. Spawning occurs in fresh water, with young salmon migrating downstream to the ocean the following winter. Chinook salmon spend between one and four years in the ocean before returning to freshwater to spawn. Spring-run salmon migrate to freshwater as immature fish and spawn in the upper reaches of rivers in late summer and early fall. Fall-run salmon migrate to freshwater at maturity and tend to spawn more quickly in the lower reaches of rivers.

Threats to these species include damming of rivers, increases in water temperature and sedimentation associated with modification of natural flow regimes, degradation of water quality

associated with agriculture, mining and recreational use of water, and the introduction of non-native species.

Chinook Salmon are not known to occur in Penitencia Creek. There have been recorded sightings in Coyote Creek which is located two miles downstream from the development property. Chinook salmon are not likely to spawn in the reach of the Penitencia Creek adjacent to the development property because of the presence of fine sediments in the channel bottom and lack of habitat features. It is unlikely that Chinook salmon occur in the channel adjacent to the development property. This species was not observed during surveys performed July 2003 through January 2004.

Central Valley Steelhead

The Central Valley steelhead (*Oncorhynchus mykiss)* are listed as threatened under the ESA. This ESU includes the population of the Sacramento and Sam Joaquin River in the central valley of California. Critical habitat includes all rivers accessible to steelhead in the Sacramento and San Joaquin rivers and their tributaries in the state of California. Rivers and estuaries of the Sacramento and San Joaquin Delta and all waters from Chipps Island to Carquinez Bridge, and waters of San Pablo Bay to the Carquinez Bridge, and all waters of San Francisco Bay, north of the San Francisco/Oakland Bay Bridge are also included.

Historical distributions of Central Valley steelhead included most of the tributaries of the Sacramento and San Joaquin rivers. Two life history forms of this species include the anadromous form, which spends part of its time in freshwater and part in the ocean, and the freshwater resident form, known as the rainbow trout. Spawning occurs in cool streams with low turbidity, and suitable sites for egg deposition. Juveniles spend between one and four years in freshwater and then migrate to ocean waters for one to two years before returning to freshwater to spawn. As with Chinook salmon, threats to this species include damming, degradation of water quality and introduction of non-native species.

Steelhead are known to be present in Coyote Creek. The CNDDB reports that spawning occurs in gravel substrates in nontidal reaches of Coyote Creek upstream of the confluence with Penitencia Creek. Steelhead are not likely to spawn in the reach of the Penitencia Creek adjacent to the development property because of the presence of fine sediments in the channel bottom and lack of habitat features. It is unlikely that steelhead occur in the channel adjacent to the development property. This species was not observed during surveys performed July 2003 through January 2004.

Vernal Pool Tadpole Shrimp

The vernal pool tadpole shrimp (*Lepidurus packardi*) is listed as and endangered species by the USFWS. It has no special status in the state of California. Vernal pool tadpole shrimp occur in vernal pools, grass-bottomed swales, and even water-filled vehicle tracks in clear to turbid waters. Vernal pool tadpole and other fairy shrimp cysts may remain dormant within the soil for a very long duration and birds can transport cysts to new locations through their droppings. Vernal pool tadpole shrimp are known to occur within a six-mile radius of the development

property. Outside of the Central Valley there is only a single record. This occurrence is from a vernal pool complex located in the Warm Springs seasonal wetland on the San Francisco Bay National Wildlife Refuge in the City of Fremont, Alameda County (Federal Register 1994). The CNDDB (CDFG 1998) reports the Fremont observation as located southwest of Fremont, in salt evaporation ponds approximately 1.5 kilometers southwest of Albrae Street.

Vernal pool tadpole shrimps inhabit vernal pools ranging in size from 54 square feet to 89 acres. The vernal pools are unique wetland features located most commonly in mud- or grass bottomed swales of grasslands in old alluvial soils underlain by hardpan or in mud-bottomed pools containing clear to highly turbid water (Federal Register 1994).

Eggs laid during the previous season hatch within three weeks of winter rainwater inundating the pools. Vernal pool tadpole shrimps can reach sexual maturity within three to four weeks of hatching (Federal Register 1994). Adults are often reproductive continuously until the pools dry up in the spring (Federal Register 1994).

The detention/settling basin and isolated seasonal wetlands that occur in the southern portion of the development property represent suitable habitat. However, the basin and wetlands would be unlikely habitat for vernal pool tadpole shrimp due to their recent excavation from former uplands and disturbed nature (annual disking). Soils found in the on-site wetlands are not typical vernal pool soils. It is unlikely that vernal pool tadpole and other fairy shrimp occur on the development property. This species was not observed during general surveys performed July 2003 through January 2004.

California Tiger Salamander

California tiger salamander (*Ambystoma californiense*) (CTS) is listed as a federally threatened species by the USFWS in California, and is listed under CDFG regulations as a species of special concern California. This species typically breeds in vernal pools and other similar seasonal wetlands and will aestivate in the burrows of California ground squirrels. Potential aestivation habitat, in the form of ground squirrel (*Spermophilus beecheyi*) burrows can be found throughout the development property although these burrows are seasonally destroyed when disking occurs.

CTS have been known to occur at several locations within a five mile radius of the development property. The most recent reported occurrence was in 2001 along Toregas Creek in Fremont, approximately 4 miles northeast of the development property. In 1995, CTS were observed northeast of Scott Creek Road and the 680 Freeway in Fremont, approximately 3 miles northeast of the site. Although appropriate habitat for CTS occurs on the development property, this species is unlikely to occur due to the highly disturbed nature of the site resulting from a regular program of disking that has occurred for over 10 years. In addition, the property is isolated from other potential CTS habitat and no means of dispersal exists to reach the site. This species is presumed absent from the development property due to the lack of breeding habitat, the absence of dispersal corridors, and the absence of suitable aestivation habitat. This species was not observed during surveys performed July 2003 through January 2004.

Red-Tailed Hawk and Red-Shouldered Hawk

The red-tailed hawk (*Buteo jamaicensis*) and red-shouldered hawk (*Buteo lineatus*) are protected species in the state of California by CDFG code. The red-tailed hawk is a large buteo that is distinct due to the red color of its tail feathers in contrast to the brown color of its body. Not all red-tailed hawks exhibit the distinct coloration on their tail and gradations may occur especially in young birds. Red-tailed hawks hunt rodents by soaring over grasslands, ruderal vegetation, and other urbanized habitats to search for prey.

The red-shouldered hawk is a medium-sized, slender Buteo with long legs and a long tail and is smaller than the red-tailed hawk. Upperparts are dark with pale spotting, and rusty-reddish feathers on the wing create the distinctive shoulder patch. The tail has several wide, dark bars; the intervening narrow stripes and the tip of the tail are white, and there is variation in the number of tail bars among adults and juveniles. In the west, the red-shoulder hawk occurs in riparian areas, and it has expanded its range of occupied habitats to include various woodlands, including stands of eucalyptus trees amid urban sprawl.

Nest trees for red-tailed and red-shouldered hawks are usually tall trees with a well-developed canopy that include a strong branching structure on which to build a nest. Potential nesting habitat in the form of tall eucalyptus, redwood, and elm trees can be found in the landscaped habitats on the development property. Foraging habitat also exists within the development property. This species was not observed during surveys performed July 2003 through January 2004.

American Kestrel

The American kestrel (*Falco sparverius*) is protected by CDFG codes and is protected in the state of California. The American kestrel is the smallest of raptor species and is distinct due to its diminutive size and black barring on its head. The female kestrel is slightly larger than the male bird and is differentiated by its brown and red coloration. The male kestrel is slightly smaller than the female and has grey wing patches near the top of the wing. Kestrels utilize cavities in trees for nesting and hunt small rodents and sometimes, small birds. Foraging habitat exists within the development property for kestrels and potential nesting habitat exists among the row of elm trees. This species was not observed during surveys performed July 2003 through January 2004.

Northern Harrier and Loggerhead Shrike

Northern harrier (*Circus cyaneus*) and loggerhead shrike (*Lanius ludovicianus*) are both California species of special concern and are protected by CDFG code. Neither species was observed during surveys performed July 2003 through January 2004. Suitable breeding and foraging habitat for northern harrier in the form of non-native herbaceous vegetation including grasslands are also found on the development property. Potential nesting habitat for loggerhead shrikes occurs on site in areas where coyote brush and other small shrubs can be found. Barbed wire fences along the western boundary of the site provide features that shrikes use for impaling prey and storing food caches.

White-tailed Kite

White-tailed kite (*Elanus caeruleus*), a species protected under CDFG codes, was not observed during field surveys of the site. The white-tail kite is falcon-shaped with a long white tail. This raptor has black patches on the shoulders that are highly visible while the bird is flying or perching. This raptor often hovers over the land while inspecting the ground below for prey items. The small to large sized trees found on the site could potentially provide suitable breeding habitat for this species. In addition, herbaceous field habitat provides appropriate foraging habitat for the white-tailed kite. This species was not observed during surveys performed July 2003 through January 2004.

Burrowing Owl

The burrowing owl (*Athene cunicularia*) is a California species of special concern and is protected under the federal Migratory Bird Treaty Act.

Burrowing owls are a small burrowing-dwelling resident of dry, open grassland and desert habitats, nesting in areas of low shrubs or short grasslands, which afford them a better lookout for potential predators. In California, burrowing owls are known to inhabit the burrows of ground squirrels. The burrowing owl is mostly insectivorous, but they also consume small rodents and mammals. The breeding season for burrowing owls runs from March through August with the peak of breeding occurring in April and May.

Occurrence On-Site and on Adjacent Properties - Olberding Environmental conducted surveys for burrowing owls in July 2003. Twelve burrowing owls were observed on and adjacent to the development property. Six occupied burrows containing numerous castings, droppings, and feathers were observed during transect surveys during summer of 2003. These sites were also confirmed to support owls by visual observation of active birds. Dozens of ground squirrels and many potential burrow sites were observed on the development property. Many other burrow systems were observed on the development property and revealed signs of ground squirrel occupation by evidence of grass and vegetation cuttings, droppings, and newly excavated dirt mounds.

Burrowing owls have been documented as using the development property over the past several years, and are known to use nearby grassland habitats as recorded by CNDDB. Six active burrows were documented in the vicinity of the development property. One burrow was confirmed to support juveniles, four burrows were identified as likely nesting sites due to the presence of one or two owls, and one burrow site was identified as occupied by an owl who's nest site was previously disturbed. An active colony of burrowing owls occupies the development property.

Regional Significance - The development property and adjacent areas consist of one of the few remaining tracts of land in the Santa Clara Valley that can still support a relatively large population of burrowing owls. Remaining open space in the Santa Clara Valley is largely limited to habitats that are not suitable for burrowing owls or that have been approved for development.

Tricolored Blackbird

The tricolored blackbird (*Agelaius tricolor*) is a California species of special concern and a federal species of concern. Tricolored blackbirds are highly colonial and nomadic and are largely endemic to the lowlands of California. They prefer to nest in freshwater marshes with dense growths of emergent vegetation, but will nest in upland locations that support dense stands of herbaceous vegetation, especially plant species that are armed with thorns or spines (Beedy et al. 1991, T. Beedy, pers. comm.). They nest from mid-April through mid-July. They will travel up to four miles to forage (Zeiner et al. 1990).

This species was not observed during surveys performed July 2003 through January 2004. A small colony of tricolored blackbirds was recorded in the Coyote Creek percolation ponds, approximately 2.5 miles northwest of the development property in 1983 (Beedy et al. 1991). No breeding habitat is present on the property for this species. The ruderal fields on the property provide potentially suitable foraging habitat for tricolored blackbirds during the breeding and non-breeding seasons.

Southwestern Pond Turtle

The Southwestern pond turtle (*Clemmys marmorata pallida)* is a federal species of concern. It is a state species of special concern and a state protected species. The southwestern pond turtle occurs south of the San Francisco Bay and Sacramento/San Joaquin River Delta (Stebbins 1985). Pond turtles occur in ponds, marshes, rivers, streams, and irrigation ditches that typically have rocky or muddy bottoms and are vegetated with aquatic plants (Stebbins 1985). Although female pond turtles are noted for long overland treks to lay eggs, moving as much as a quarter of a mile away from water, they usually deposit their eggs within 15 to 200 yards from water, in sandy banks or open, grassy fields (Jennings and Hayes 1994). Eggs are laid from April through August (Stebbins 1985).

Pond turtles were not observed on the development property during surveys performed in 2003 and 2004 and are not expected to occur on the site because of the absence of streams or impoundments that support tall aquatic plants, such as cattails (*Typha* sp.). Annual disking and continual disturbance of the adjacent upland habitats to Penitencia Creek would make these area unsuitable for pond turtles.

Pallid Bat

Pallid bat (*Antrozous pallidus*) is a species of special concern in California. They roost in buildings, rocky outcrops and crevices in mines and caves. They are known to forage over a variety of habitats. No appropriate breeding habitat for pallid bat exists within the development property; however, they may forage over the herbaceous field and the detention basin located to the south of the property. There is one nearby colony of pallid bats in the Berryessa area, located approximately 2 miles from the development property (H.T. Harvey & Associates 2002). It could be assumed these bats would find suitable roosting opportunity in the vicinity of the development property including several of the larger structures. This species was not observed during surveys performed July 2003 through January 2004.

Table 2
Special–Status Wildlife Species with Potential to Occur in the Vicinity of the Site

Common Name (Scientific Name)	Status Federal/State
Insects and other Arthropods	
Vernal pool tadpole shrimp (*Lepidurus packardi*)	FE/
Amphibians	
California Red-legged Frog (*Rana aurora draytonii*)	FT/SC
California Tiger Salamander (*Ambystoma californiense*)	FT/SC
Reptiles	
Western Pond Turtle (*Clemmys marmorata*)	--/SC
Birds	
California Clapper Rail (*Rallus longirostris obsoletus*)	FE/SE
California Least Tern (*Sterna antillarum browni*)	FE/SE
Western Snowy Plover (*Charadrius alexandrius nivosus*)	FT/SC
Cooper's Hawk (*Accipiter cooperi*)	--/SC
Sharp-shinned Hawk (*Accipiter striatus*)	--/SC
Red-tailed Hawk (*Buteo jamaicensis*)	--/FP
Red Shouldered Hawk (*Buteo lineatus*)	--/FP
Northern Harrier (*Circus cyaneus*)	--/SC
White-tailed Kite (*Elanus caeruleus*)	--/FP
Golden Eagle (*Aquila chrysaetos*)	--/SC
Burrowing Owl (*Athene cunicularia*)	C/SC
Loggerhead Shrike (*Lanius ludovicianus*)	--/SC
Tri-colored Blackbird (*Agelaius tricolor*)	--/SC
Salt Marsh Common Yellowthroat (*Gepthlypis trichas sinuosa*)	FC/SC
Mammals	
Pallid Bat (*Antrozous pallidus*)	--/SC
Salt Marsh Wandering Shrew (*Sorex vagrans halicoetes*)	FC/SC
Salt Marsh Harvest Mouse (*Reithrodontomys raviventris*)	FE/SE
Fish	
Chinook Salmon *(Oncorhynchus tshawytscha)*	FT/SC
Central Valley Steelhead (*Oncorhynchus mykiss)*	FT

The wildlife status definition and governing agencies follow:

Federal Status Definitions

E = Endangered: Any species, which is in danger of extinction throughout all or a significant portion of its range.

T = Threatened: Any species, which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

C = Taxa which are under review, and for which sufficient biological information exists to support a proposal to list as an endangered or threatened species.

M = Avian species and their nests which are protected during their breeding season under the Federal Migratory Bird Treaty Act.

State of California Definitions

E = Endangered: A native species or subspecies of animal, which is in serious danger of becoming extinct throughout all, or a significant portion of its range, due to loss of habitat, change in habitat, over-exploitation, predation, competition and/or disease.

T = Threatened: A native species or subspecies that, although not presently threatened with extinction, is likely to become an endangered species in the foreseeable future in the absence of special protection and management efforts.

SC = CDFG Species of Special Concern

FP = Fully Protected under CDFG codes.

= Taxa given special consideration because they are biologically rare, very restricted in distribution, declining throughout their range, or at a critical stage in their life cycle when residing in California, or taxa that are closely associated with a habitat that is declining in California (e.g., wetlands, riparian, old growth forest)

Wetlands/Waters on the Development Property

Wetlands are areas in which soils are intermittently or permanently saturated or inundated. The resulting anaerobic conditions encourage the germination of plant species known as hydrophytes, which show a high degree of fidelity to such conditions. The physical appearance of wetlands varies considerably from the open water of a river to the seasonal ponding of alkaline flats, and generally includes swamps, bogs, marshes, vernal pools, riparian woodlands, and other similar areas supporting hydrophytic vegetation. Due to the seasonal nature of rainfall in California, some wetlands may experience soil saturation for only a few weeks out of the year. Wetlands are identified by the presence of hydrophytic vegetation, hydric soils, and wetland hydrology according to methodologies outlined in the 1987 U.S. Army Corps of Engineers' Wetlands Delineation Manual.

Wetlands within the Project Area

Based on field work and associated wetland delineation report completed for the development property, a total of 1.113 acres exhibited characteristic typically associated with wetland habitats. Those areas containing positive indicators of wetland soils, hydrology and vegetation were located within the constructed detention/settling basin and isolated wetland at the south edge of the Property. The wetland/nonwetland boundary for these areas were based on the change in the vegetative community, presence of hydrological indicators, and presence of hydric soils. Table 3 summarizes the area associated with each wetland feature. A map exhibiting the location of potential wetland features is included in Appendix C.

Table 3
Development Property Wetlands

Wetland Number	Potential Wetland Area In Square Feet	Acreage of Wetland
Wetland # 1 Detention/Settling Basin	32,670	0.750*
Wetland #2 Isolated Feature	15,812	0.363*
TOTAL	**48,482**	**1.113***

* Exempt from Corps regulation.

Both of these wetland areas are unregulated by the Corps due to their qualification for several exemption categories. The detention/settling basin was excavated on dry land for the purpose of stormwater runoff detention. This area was not historically linked to a channel or drainage area and consisted of an upland position prior to basin construction. Features such as this do not generally fall within the jurisdiction of the Corps and are exempt from regulation.

The isolated wetland feature is also exempt from Corps regulation due to its creation during construction activity. The wetlands were created incidental to ongoing construction activity on the Property as a result of activities associated with the redistribution of excavated soil material removed during the construction of the basin. The stockpile material has been temporarily placed at its present location pending approval to redistribute it across the remainder of the Property. In doing so, placement of the stockpile on the gently sloped topography currently blocks the natural flow of precipitation runoff causing a seasonal pond to form behind the pile. It appears this pond feature qualifies for a discretionary exemption rather than an isolated wetland based the preamble discussion of the Corps regulations in the November 13, 1986 *Federal Register.*

Jurisdictional Waters

Penitencia Creek, located on the west side of Abel Street, runs from south to north along the development property and would be considered a jurisdictional waters of the U.S. This feature is a perennial watercourse and is represented on the U.S.G.S quadrangle map for Milpitas as a tributary to Coyote Creek. Although channelized, Penitencia Creek was determined to be an "other waters" feature based on the presence of an ordinary high water mark that was defined by scour, drift lines, and water marks. The Creek is an active channel that supports year round water flows which are tributary to the San Francisco Bay. Other regulatory agencies that impose jurisdiction within the Penitencia Creek channel include the RWQCB, CDFG and the Santa Clara Valley Water District.

Based on information obtained during the wetland delineation survey and verified by the Corps on July 22, 2004, it was determined that a total of 0.4 acres of jurisdictional "waters" exists within the survey boundaries as summarized below in Table 4. These features are mapped in the jurisdictional wetland delineation map shown in Appendix C.

Table 4
Other Water Features within the Development Property

Feature	Average Width in Feet	Linear Feet	Acres	Vegetation
Penitencia Creek	22	798	0.400	Sparse annual grasses and forbs
TOTAL			**0.400**	

Ordinance Trees

The development property supports several stands of trees that may qualify for analysis under the City of Milpitas tree protection ordinance. Trees on vacant or undeveloped lots with a diameter at breast height of 12 inches or more are subject to removal only by permit from the City. There is a row of large sized elm trees within the development property located east of Abel Street that may be of sufficient size and description to be regulated by the tree protection ordinance. The elm trees (*Ulmus americana*) are also recognized as the "O'Toole elm trees" which lined the

roadway to an historic estate. The O'Toole elms were evaluated by a consulting arborist who determined that all specimen trees were in poor condition due to problems with structural form, health, and overall physical condition. Several trees also were observed to exhibit signs of Dutch elm disease. Regardless of the condition of on site elm trees their removal would be subject to the authority of the City under their tree ordinance. In addition, redwood and eucalyptus trees occur on the northern and western development property boundary that could potentially meet the City tree protection ordinance.

6. Biological Resources Impacts

Thresholds of Significance

For the purposes of this project, impacts to vegetation and wildlife are considered significant if the project would:

- substantially affect a rare or endangered species of animal or plant or the habitat of the species;
- have a substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special-status species in local or regional plans, policies or regulations; or
- have a substantial adverse effect on any riparian habitat or other sensitive natural community identified in local or regional plans. Policies, or regulations; or
- interfere substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors, or impede the use of native wildlife nursery sites; or
- eliminate specimen quality examples of tree species or substantially reduce the number of smaller trees within a given area, or significantly reduce nesting or roosting habitat for birds within the project area; or
- conflict with any local policies or ordinances protecting biological resources, such as a tree preservation policy or ordinance; or
- substantially reduce the habitat of a fish or wildlife species; or
- cause a fish or wildlife population to drop below self-sustaining levels; or
- threaten to eliminate a plant or animal community; or
- reduce the number or restrict the range of a rare or endangered plant or animal; or
- damage or reduce the size of an existing environmentally sensitive habitat area; or
- result in contamination or an environmentally sensitive habitat area that has that potential to adversely affect health or reproduction of native plants or wildlife in the habitat area.

Development of Project could have direct impacts on: wetland habitats; Penitencia Creek; six special-status plant species (see *Special-status Plant Species* section above); "ordinance size" trees; various bat species; burrowing owl; white-tailed kite, northern harrier; other raptors; and loggerhead shrike. In addition, the project could result in potential indirect impacts to Chinook salmon and steelhead trout occurring in Coyote Creek, which is located approximately two miles downstream. Indirect impacts would be associated with additional stormwater runoff and potential sedimentation from construction activities. The impacts discussion below focuses on the identified significance criteria.

Special-Status Plant Species

Due to the highly disturbed nature of the site resulting from a program of regular disking and mowing, it is unlikely that any special-status plant species occur on the site. However, marginally suitable habitat for Congdon's tarplant, San Joaquin spearscale and fragrant fritillary was identified in undisturbed grassland habitat scattered throughout the development property. The conditions within the detention/settling basin and isolated wetland may also represent potentially suitable habitat for alkali milkvetch, Contra Costa goldfields and prostrate navarretia. Botanical surveys have been performed from July 2003 through August 2004. These surveys were conducted during the identified blooming period for six of the ten special-status species having potential to occur on the development property. Surveys to establish whether any of the four remaining species (alkali milk-vetch, Contra Costa goldfields, fragrant fritillary and hairless popcorn-flower) is present should be conducted during their blooming period. With the exception of fragrant fritillary, all remaining species are associated with wetland habitats and would be assumed to occur only in the detention/settling basin and isolated wetland. If these species were found on the development property in high numbers, development activities could result in the loss of these plant species resulting in a significant impact to special-status plant species.

- **The project could potentially result in significant impacts to special-status plant species. (Significant Impact)**

Special-Status Animal Species

Special-Status Fish Species

Special-status fish species including Central Valley spring-run Chinook salmon, Sacramento River winter-run Chinook salmon, and Central Valley steelhead may potentially occur in Coyote Creek located two miles downstream from Penitencia Creek and the development property. Proposed development could potentially result in impacts to special-status fish species in the form of degradation of water quality due to discharge of soils and other materials into Penitencia Creek during construction. The discharge of stormwater runoff from the developed project, through the existing stormwater system, could add additional pollutants to Penitencia Creek further degrading water quality. The amount of pollutants (i.e., sediment, metals, oil and hydrocarbons) originating from the development project would be minor in comparison to overall pollutant loads generated by upstream developments. However, the addition of these pollutants may contribute cumulatively to habitat degradation in Penitencia and Coyote Creek.

- **Runoff of soils and other materials into Penitencia Creek could impact special-status fish during construction of outfalls, the bridge structure and placement of rock slope protection. Additional pollutants contained within stormwater runoff could contribute to cumulative water quality degradation within Penitencia Creek. (Significant Impact)**

Loss of Nesting Habitat for Birds, Including Sensitive Species Such as Raptors and Migrating Songbirds

Trees and shrubs scheduled for removal on the development property provide suitable nesting habitat for raptors and sensitive bird species. Raptors such as red-tailed hawk, red-shouldered hawk, white-tail kite, and loggerhead shrike may potentially nest within the on-site trees and shrubs. Tree removal during the nesting season could destroy nests of sensitive bird species. Nesting raptors and other migratory bird species are protected under the provisions of the Migratory Bird Treaty Act and the CDFG Code Sections 3503, 3503.5 and 3800. Impacts to raptor nests or nests of migratory bird species would result in a significant impact.

Suitable nesting habitat for red-tailed hawk and red-shouldered hawk as well and marginally suitable habitat for other tree-nesting raptor species can be found in the landscaped areas of the development property. Tall eucalyptus and elm trees occur within the development property area and are suitable for nesting. Foraging habitat for a variety of raptor species, including several migratory raptor species can be found in the annual grassland and ruderal habitats on the development property. Removal of potential nesting trees as well as conversion of grassland and ruderal habitats to developed habitats would result in a loss of suitable nesting and foraging habitat for raptor species. If raptors were found nesting on the site, impacts to nesting individuals would result in a potentially significant impact.

- **The project could potentially result in significant impacts to special-status raptor and bird species and the take of these species during the nesting season. (Significant Impact)**

Burrowing Owl

The recent development of much of the Santa Clara Valley, including projects in Milpitas, north San Jose, Santa Clara, Sunnyvale, Mountain View and Alviso have resulted in significant losses of habitat for burrowing owls. The CDFG has undertaken planning efforts to preserve burrowing owl habitat in this region; however, specific sites have not been set aside for preservation and large tracts of appropriate habitat for burrowing owls continue to be developed at a rapid pace. Development of the development property would result in at least eight burrowing owls being displaced from their primary burrows and the loss of foraging habitat for at least four others. With very few alternative sites in the region for these individual owls to move, this could result in a net loss of these individuals to already limited population of owls in the Santa Clara Valley. This could significantly compromise the ability of the Santa Clara Valley population of the burrowing owl to continue to be self-sustaining. In addition, the project would result in the loss of a significant amount of foraging habitat for burrowing owls and other raptor species.

- **The project will result in the loss of burrowing owl nesting and foraging habitat. (Significant Impact)**

Pallid Bat

No focused surveys for bats have been conducted for the development property; however, the development property has appropriate foraging habitat for pallid bats as well as a variety of other special-status bat species. Structures located on the development property may provide roosting sites for bats. A pallid bat roost is know to be present in the area of Berryessa, however multiple high quality alternative foraging sites for pallid bats are know to occur in the area. The loss of potential foraging habitat within the development property is considered to be a less than significant impact due to the availability of remaining foraging habitats in the vicinity of the development property.

- **The project would result in a less than significant impact to pallid bats. (Less than Significant Impact)**

Impacts to Regulated Wetlands/Waters

Storm run-off from the development property may be directed into the Penitencia Creek system through an underground storm drainage system. The development activities may involve the construction of two outfalls to Penitencia Creek, resulting in impacts to regulated waters. One outfall is designed to capture runoff from the east side of Penitencia Creek, east from Able Avenue. A second outfall is intended to capture runoff from the lands on the west side of Penitencia Creek. The potential construction of the outfalls, bank protection and dewatering structures will result in impacts to approximately 0.01 acres of jurisdictional waters.

The constructed drainage ditch adjacent to 880 Freeway lies just outside the development property boundary and will not be impacted by development. The detention/settling basin and isolated seasonal wetland areas that were delineated on the south side of the development property would be impacted by project implementation. Approximately 1.113 acres of wetlands are to be impacted (filled). These wetland features are regulated by RWQCB.

A bridge structure is proposed over Penitencia Creek accessing the development property from Abel Street. The bridge would be constructed with abutments located outside the active channel near the top of bank. A single support pier would be located in the upper terrace on the western side of the channel. A small amount of rock rip rap bank protection may be required below the two abutments and support pier. These impacts would amount to less than 0.01 acres of impact to the Penitencia Creek channel.

A total of 0.02 acres of Corps jurisdictional waters would be impacted by the development project, while a total of 1.113 acres of RWCQB jurisdictional wetlands would be. A total of 1.133 acres of regulated wetlands/waters will be impacted during project implementation.

Impacts to Penitencia Creek are regulated by the Corps, RWCQB, CDFG, and the Santa Clara Valley Water District. Impacts to wetland features fall under the jurisdiction of the RWQCB.

- **The project would result in a potentially significant impact to waters of the U.S. (Significant Impact)**

Impacts to Ordinance Trees

Many trees are anticipated for removal within the project area. Within the development property, an unspecified number of other trees may be protected by the City of Milpitas tree ordinance by meeting size requirements in the City code. A row of large size elm trees occurs on the east side of Abel Street, while eucalyptus and redwood trees occur along the northern and western project border. The elm trees have been identified with historic significance as they are called the "O'Toole elm trees" which are recognized for lining a roadway to a historic estate. It appears that many of the elm and other ornamental trees would meet the minimum size requirement of 12 inches in diameter at breast height. Tree removal on the development site will require approval from the City of Milpitas under their tree protection ordinance. The O'Toole elm trees have been evaluated in poor condition and carrying disease; therefore, their removal allows for their replacement with healthy, disease resistant varieties and a beneficial impact as a result of project implementation.

- **The project could potentially result in a less than significant impact to ordinance trees. (Less than Significant Impact)**

7. Mitigation Measures for Biological Resources Impacts

The following measures are proposed as part of the development project to avoid or minimize impacts to biological resources:

Impacts to Special-Status Plant Species

Four plant species have the potential to occur on the development property. Several of these plant species could not be reliably detected during surveys conducted in July and December 2003 and January and August 2004, and because suitable habitat is present, these species are considered potentially present on the development property. If present, loss of the entire population of any of these plants from the development property would be a significant impact.

The following mitigation measures would reduce impacts to these special-status plants to a less than significant level. The mitigation measures have been developed for the four special-status plants that are potentially present on the development property. However, if any other special-status plants as defined in this document were found, those plant species would also be covered by the mitigation measures outlined below and would not necessitate the recirculation of the EIR.

Mitigation Measure 1.1. Appropriately timed surveys should be conducted by a qualified botanist according to protocols acceptable to USFWS and CDFG to determine the presence/absence of the four special-status plant species. Surveys to detect the presence of special-status plant species should be conducted during the appropriate blooming period for each species. While only marginally suitable conditions exist for these species, surveys should be conducted to ensure that they are absent from the site. If these surveys do not detect the presence of these or any other special-status plant species, no further mitigation measures will be necessary. These plants can only be detected in the absence of disking, and any such survey should be done prior to site disturbance.

Mitigation Measure 1.2. If special-status plant species are detected, CDFG shall be contacted and appropriate protocols for relocating these plants shall be implemented.

Mitigation Measure 1.3. If identified, a rare plant mitigation and monitoring plan should be developed to provide for the long-term protection of special-status plant species believed present, per the above mitigation measure. The mitigation and monitoring plan for the plant species present would be prepared and, after review and approval by the City of Milpitas the plan should be implemented. The plan should have provisions for either preservation in place or salvage of plant materials. The plan should provide for the long-term persistence of a sustainable population of that plant species in the designated preserve area on the development property or on a similarly dedicated and preserved area in the general vicinity of the development. The plan should contain funding and functional assurances for the maintenance and monitoring of the plants along with performance standards. The plan should be implemented either before or concurrently with ground disturbing activities on the development property. The key to successful implementation of the plan will be the long-term assurance of population viability for the given plant species.

Mitigation Measure 1.4. The CDFG requires a 10-day notification period prior to any grading or earthworks that will effect a listed plant species. Therefore, prior to construction a survey and staking of the any rare plants on site would be required so that salvage of said plant material could be accomplished by CDFG.

***Conclusion*: Implementation of the above mitigation measures would reduce impacts to special-status plant species to a less that significant level. (Less Than Significant Impact with Mitigation)**

Impacts to Special Status Fish Species

Development of the property could potentially result in inputs of toxic substances, including herbicides, insecticides, fertilizers, petroleum products, and additional sediments into Penitencia and Coyote Creek which would adversely affect habitat potentially occupied by Chinook salmon and the central valley steelhead, both federally threatened species.

Development of the property could result in increases in stormwater runoff, which could indirectly impact off-site creek habitats that support populations of these two species. Indirect impacts to these two species would be a significant impact. The following mitigation measure would reduce the indirect impacts of off-site runoff to Chinook salmon and steelhead to a less than significant level.

Mitigation Measure 2.1. Prepare a Stormwater Pollution Prevention Plan (SWPPP). This plan should include provisions to minimize on-site and off-site impacts to biological resources resulting from project related runoff. Mitigation measures defined in the SWPPP should include:

- The use of silt fencing, straw bales, sediment basins, and other measures to reduce the movement of construction-related sediments into Penitencia Creek and other sensitive habitats from the development property.

- The installation of grit and oil trap systems, which should be maintained in perpetuity, to prevent non-point source pollutants from entering Penitencia Creek and other sensitive habitats. Equipment and layout of these systems should be installed by professionals familiar with these systems to assure successful functioning during extreme storm events.

Mitigation Measure 2.2. Implementation of BMPs, compliance with the City of Milpitas Grading Ordinance and the installation of construction and silt fencing and/or fiber rolls will prevent the discharge of construction debris and soil into Penitencia Creek during site clearing, grading and construction.

Mitigation Measure 2.3. Additional mitigation measures may include dewatering the section of creek channel surrounding the work areas associated with outfall and bridge construction. The dewatering structure shall be constructed with hand placed sand bags or other CDFG approved material.

Conclusion: With implementation of BMPs, preparation of a SWPPP plan, compliance with the City of Milpitas Grading Ordinance and installation of erosion control measures, the project will not result in significant impacts to special-status fish species in Penitencia Creek. (Less Than Significant Impact with Mitigation)

Impact to Nesting Habitat for Birds, Including Sensitive Species such as Raptors and Migrating Songbirds

Suitable foraging and nesting habitat for raptors such as red-tailed hawk, red-shouldered hawk, as well as multiple migratory songbird species occurs within the boundary of the development property. Loss of nesting habitat would be considered a significant impact. Impacts associated with other use of the site by raptors, such as foraging, would be considered less than significant because suitable foraging habitat is available elsewhere in the vicinity of the development property.

The following mitigation measure would reduce potential impacts to nesting raptors to a less than significant level.

Mitigation Measure 3.1. To avoid the nesting season of raptors, tree and shrub removal should not take place between February 15 and August 1, or as determined by CDFG on a case-by-case basis. Vegetation removal during the non-nesting season is recommended to ensure no nest establishment occurs in trees and shrubs scheduled for removal.

Mitigation Measure 3.2. If tree removal between February 15 and August 1 is required, a pre-construction survey shall be conducted no more than 30 days before the removal of any tree or shrub to identify the presence, or absence or raptor nests. If no nests are identified in trees to be removed during the pre-construction survey, no further mitigation is necessary. If nests are identified, CDFG shall be contacted and appropriate protocols for buffers initiated.

Mitigation Measure 3.3. If active nests are found within the trees in the development property, i.e. within eucalyptus, elm, redwood, or shrubs, CDFG requires a buffer area of 150 feet around

the nest tree until juvenile raptors have fledged and are no longer dependant upon the tree for survival.

Mitigation Measure 3.4. If shrub vegetation removal is to occur between February 15 and August 1, a pre-construction survey for nesting migratory songbirds will be necessary to ensure that trees and shrubs are free of nesting birds. If songbird nests are found, a disturbance-free buffer should be established around the nest tree or shrub and the nest should be monitored until young birds have fledged. If this is not possible, the nest should be monitored to determine when young birds are old enough to be taken from the nest and moved to an appropriate wildlife rehabilitation facility for hand-rearing.

***Conclusion*: Implementation of the above mitigation measures would reduce impacts to nesting raptors and migratory song birds to a less than significant level. (Less Than Significant Impact with Mitigation)**

Impacts to Burrowing Owl

Twelve burrowing owls and six active nests were found on the development property with combined home ranges estimates to encompass the entire site. It is assumed that burrowing owls currently residing on the Property will be evicted prior to construction. It is also assumed that evicted owls will be able to move to alternative locations containing suitable habitat. Passive relocation of burrowing owls should not result in the direct loss of individuals due to their mobility. Suitable habitat exists approximately three quarters of a mile to the west along the Coyote Creek corridor and the San Jose/Santa Clara County Water Pollution Control Plant. Additional habitat exists in the foothill region of Milpitas located approximately two miles to the east. Both sites are well within the flight range of burrowing owls. The following mitigation measures would reduce indirect impacts to burrowing owl nesting and foraging habitat to a less than significant level.

Future unavoidable impacts to burrowing owls within the development property boundaries will be mitigated through the preservation and permanent protection of off-site burrowing owl habitat. A mitigation agreement (MA) for burrowing owls has been reached between the Project proponent and the CDFG. An offsite area has been selected to accommodate the appropriate number of acres required for burrowing owl mitigation. At the time of proposed development, the number of owls and the total number of acres required for mitigation will be determined. Surveys prior to development would be used to determine the number of owls on the development site and the number of active burrows. A final mitigation acreage number for burrowing owls will be developed in consultation with the CDFG. Once the total acreage number for mitigation acreage is established, the mitigation area will be placed under a permanent conservation easement. After the MA is reached and finalized a passive relocation program will be initiated.

For the nesting season in the year 2004, no attempts at passive relocation will occur and the development property will be undisturbed. The burrowing owls will be allowed to begin and complete their breeding cycle within the development property. The following measures should be implemented to assure no disturbance occurs to the burrowing owls that currently occupy the site during the 2004 breeding season:

Mitigation Measure 4.1. Prior to any discing for fire or weed control, a burrowing owl nesting/occupancy survey should be completed on the development property. As established by the CDFG, burrowing owl surveys should be conducted by walking suitable habitat on the entire property and (where possible) in areas within 150 meters (approximately 500 ft) of the project impact zone. The 150-meter buffer zone is surveyed to identify burrows and owls outside of the project are which may be impacted by factors such as noise and vibration (heavy equipment, etc) during project construction. Pedestrian survey transects should be spaced to allow for 100 percent visual coverage of the ground surface. The distance between transect center lines should be no more than 30 meters (approximately 100 ft.) And should be reduced to account for differences in terrain, vegetation density, and ground surface visibility.

Mitigation Measure 4.2. Occupied burrows should not be disturbed during the nesting season, from February 1 through August 31, unless the CDFG verifies that the birds have not begun egg-laying and incubation or that the juveniles from those burrows are foraging independently and capable of independent survival at an earlier date.

Mitigation Measure 4.3. A minimum of 6.5 acres of foraging habitat, calculated on a 100-m (approx. 300 ft.) foraging radius around the natal burrow, should be maintained per pair (or unpaired resident single bird) contiguous with burrows occupied within the last three years.

Mitigation Measure 4.4. If discing is to occur, all burrowing owl nests will be identified through the above survey process and a 250-foot radius established around the site where no discing will be conducted. Each burrowing owl nest site and associated escape burrows will be protected by the 250-foot buffer zone.

Mitigation Measure 4.5. At such time as the MA is approved, mitigation actions should be carried out prior to the burrowing owl breeding season. Generally burrowing owls breed between February 1 through August 31. A passive relocation program would therefore be initiated between November 1 and January 31. The development property should be resurveyed prior to initiating mitigation actions to ensure that burrowing owls have not occupied new sites within the Project boundaries in the interim period between the initial surveys and the initiation of passive relocation mitigation measures. At a minimum the following mitigation measures should be implemented to minimize impacts to owls.

- On-site passive relocation using one way doors should be implemented to encourage owls to move from occupied burrows to alternate natural or artificial burrows that are beyond the project impact area. Relocation of owls should only be implemented during the non-breeding season between November and January 31.

- Because the project will result in the loss of all foraging habitat on the development property for burrowing owls, all of the owls on the development property should be excluded by installing one-way doors in burrow entrances. One-way doors should be left in place 48 hours in ensure that owls have left the burrow before excavation and back-filling of the burrow. Whenever possible, burrows should be excavated using hand tools and back-filled to prevent reoccupation. Sections of flexible plastic pipe should be

inserted into the tunnels during excavation to maintain an escape route for any animals inside the burrow.

- Because this project will reduce suitable foraging habitat on the development property below the threshold level of 6.5 acres per occupied burrow as well as displacing owls from occupied burrows, the habitat should be replaced off-site. Suitable off-site mitigation habitat suitable for burrowing owl habitat has been approved by CDFG. The total acreage of land will be determined at the time of the passive relocation surveys conducted prior to the undertaking the passive relocation activity. Off-site mitigation would consist of a minimum of 52 acres or 6.5 acres of mitigation habitat per occupied burrow, whichever is greater at the time of the passive relocation survey. The total acreage of land for mitigation should be placed in a conservation easement in perpetuity and managed to maintain suitable habitat.

- Suitable burrowing owl habitat can be found in annual and perennial grassland, deserts, and scrublands characterized by low-growing vegetation. Suitable owl habitat may also include trees and shrubs if the canopy covers less than 30 percent of the ground surface. Burrows are the essential component of burrowing owl habitat: both natural and artificial burrows provide protection, shelter, and nests for burrowing owls. Burrowing owls typically use burrows made by fossorial mammals, such as ground squirrels or badgers, but also may use man-made structures such as cement culverts: cement, asphalt, or wood debris piles; or openings beneath cement or asphalt pavement.

- One alternate natural or artificial burrow should be provided on the location of the off-site mitigation area for each burrow that will be excavated in the project impact area. The off-site mitigation area should be monitored on an on-going basis (the time period over which this monitoring should continue will be established once a specific off-site mitigation area has been agreed upon) to confirm owl use of alternate burrows.

Mitigation Measure 4.6. Pre-construction surveys for burrowing owls would be necessary due to the presence of this species on the development Property. A pre-construction survey would occur no more than 30-days prior to any ground disturbance activities to verify absence/presence of this species on the Property. It is recommended that an initial burrowing owl survey be performed during December and early January. If owls are discovered, passive relocation of the owls can take place prior to February 1st. If owls are discovered after February 1st, the owls must be left on site and a 250-foot buffer established until September 1st. Pre-construction surveys should occur no more than 30-days prior to any ground disturbance activities.

Although the establishment of off-site burrowing owl habitat and the associated conservation easement would partially offset the loss of nesting and foraging habitat resulting from the project, the loss of prime burrowing owl nesting and foraging habitat at the development property would remain a significant unavoidable impact.

***Conclusion*: After implementation of mitigation measures, the project would result in a significant unavoidable loss of burrowing owl nesting and foraging habitat. (Significant Unavoidable Impact)**

Impacts to Bat Species

Structures located on the golf course property may provide suitable roosting sites for various bat species. The following measures should be implemented to assure no disturbance occurs to the potential bat roosting sites:

Mitigation Measure 5.1. A pre-construction bat survey should be performed within the existing buildings prior to demolition. Surveys focused within the buildings would be recommended since they provide potential maturity, day and nighttime roost structures for bats. The focused surveys would consist of looking for roosting bats and/or bat guano during the day, and the visual and acoustic surveys conducted at the time of evening emergence and at night. If present, all bats should be removed and relocated prior to demolition of the buildings.

Mitigation Measure 5.2. If bats are detected during the pre-construction survey, a detailed mitigation would be prepared providing appropriate mitigation measures to avoid harming the bats, make recommendations for additional surveys, include avoidance measures prior to construction and detail relocation efforts.

Impacts to Regulated Wetlands/Waters

A total of 1.513 acres of regulated wetland/water features exist within the boundary of the development property. Penitencia Creek, a drainage ditch, a detention/settling basin, and isolated seasonal wetlands are found on the development property. Of the total acreage, only Penitencia Creek is regulated by the Corps, with a total of 0.400. The Project would result in 0.02 acres of impacts to jurisdictional waters located within Penitencia Creek. Impacts are associated with the construction of two outfall structures, bank stabilization and dewatering structures.

Impacts to RWQCB regulated wetland features will occur as a result of project implementation. A total of 1.113 acres of wetlands will be filled. The detention/settling basin is exempt from regulation because it consists of an artificial feature created by excavating and/or diking of dryland to collect and retain water. The basin was created to capture runoff from local streets and from the Elmwood Prison Facility. The settling basin qualifies for a Corps exemption due to its artificial origin and its creation by excavating and/or diking dry land. In addition, it does not extend or reroute former flows that passed through a drainage course or basin (having a definable bed and bank) which existed at the time of the passage of the Clean Water Act. The basin was constructed to collect rainwater and is used exclusively as settling basins to retain stormwater from development. The basin is managed and maintained as a postconstruction stormwater treatment facility. Fill of the detention basin would not fall under the regulation of the Corps.

The isolated seasonal wetland located between the detention/settling basin and stockpile is the result of ongoing construction activities associated with the redistribution of excavated soil material removed during the construction of the basin. The stockpile material has been temporarily placed at its present location pending approval to redistribute it across the remainder of the Property. In doing so, placement of the stockpile on the gently sloped topography currently blocks the natural flow of precipitation runoff causing a seasonal pond to form behind

the pile. It was determined that this isolated pond feature qualifies for a discretionary exemption rather than an isolated wetland based our interpretation of the preamble discussion of the Corps regulations in the November 13, 1986 *Federal Register*. This exempt wetland area will be filled during the course of Project implementation.

To mitigate impacts to jurisdictional wetland/waters of the U.S. the following measures are proposed:

Mitigation Measure 6.1. The proposed project shall be designed and constructed to avoid impacts to the isolated wetland depression located along the western edge of the project site. If avoidance is not possible and the area would be affected during the construction of the project, then the applicant shall contact the RWQCB to determine if the isolated, shallow depressions meet the technical criteria for jurisdictional wetlands subject to regulation by the State. If the isolated depressions are under the jurisdiction of either the RWQCB, then the applicant shall apply for permits or authorizations as needed to construct the proposed project. The applicant shall comply with the conditions of any permits. Wetland mitigation requirements would be developed during the regulatory permitting process with the RWQCB.

Mitigation Measure 6.2. The applicant will apply for a Nationwide permit from the U.S. Army Corps of Engineers for the fill of approximately 0.02 acres of regulated waters. A Streambed Alteration agreement permit will be obtained from the California Department of Fish and Game allowing the construction of the outfalls, bridge and associated erosion protection. A Regional Water Quality Control Board Section 401 Water Quality Certification and/or Waiver of Discharge Requirements will be obtained for discharges to Penitencia Creek, and the fill of 1.113 acres of isolated wetland and the detention/settling basin. An encroachment permit will be obtained from the Santa Clara Valley Water District.

Mitigation Measure 6.3. Grading and excavation activities could expose soil to increased rates of erosion during Property construction periods. During construction, runoff from the proposed Property could adversely affect aquatic life, if runoff reaches the local storm drains. Surface water runoff could remove particles of fill or excavated soil from the site, if the flow were not controlled. Implementation of appropriate mitigation measures would ensure that impacts to aquatic organisms would be avoided or minimized. Mitigation measures may include best management practices (BMP's) such as hay bales, silt fencing, placement of straw mulch and hydro seeding of exposed soils after construction as identified in the Stormwater Pollution Prevention Plan (SWPPP).

***Conclusion*: With implementation of the above mitigation measures impacts to regulated wetlands and waters would be reduced to a less than significant level. (Less Than Significant Impact with Mitigation)**

Ordinance Trees

The Project could potentially result in the removal of ordinance sized trees under the City of Milpitas Tree Protection Ordinance. The following mitigation measures should be implemented to minimize impacts to trees protected under the City of Milpitas ordinance.

Mitigation Measure 7.1. The Project applicant will employ a certified arborist to conduct a tree survey of the Project area to identify tree species, size and health.

Mitigation Measure 7.2. All trees that qualify for protection under the City of Milpitas tree ordinance will be counted and the total diameter at breast height quantified for all trees to be removed.

Mitigation Measure 7.3. The Project applicant will apply for tree removal permits from the City of Milpitas prior to site development for all trees meeting ordinance requirements.

Mitigation Measure 7.4. All trees removed meeting the tree protection ordinance will be replaced through approved landscape plantings during the development of the Project area as approved by the City of Milpitas.

***Conclusion*: Implementation of the above mitigation measures would reduce impacts to ordinance trees from a less that significant level to a beneficial impact. (Beneficial Impact with Mitigation)**